

USDOL/OALJ Reporter

[Brown v. Holmes & Narver, Inc.](#), 90-ERA-26 (Sec'y May 11, 1994)

Go to: [Law Library Directory](#) | [Whistleblower Collection Directory](#) | [Search Form](#) | [Citation Guidelines](#)

---

DATE: May 11, 1994  
CASE NO. 90-ERA-26

IN THE MATTER OF

DONALD W. BROWN,

COMPLAINANT,

v.

HOLMES & NARVER, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL ORDER APPROVING SETTLEMENT  
AND DISMISSING COMPLAINT

Before me for review is the Recommended Order for Dismissal with Prejudice issued by the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The parties submitted a Settlement Agreement (Agreement) and General Release of Claims and requested dismissal of the complaint with prejudice. See Agreement at Par. 4. The ALJ approved the Agreement and recommended dismissal of the complaint with prejudice.

The Agreement appears to encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate, and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

The ALJ noted that "the terms of the settlement have been separately filed in a sealed envelope and are considered to be confidential commercial or financial information which have not

---

[PAGE 2]

been disclosed to the public." The Secretary has concluded that settlement agreements, which are part of the record in a case, are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988). The FOIA requires agencies

to disclose requested documents unless they are exempt from disclosure. *Richter, et al. v. Baldwin Assoc., et al.*, Case Nos. 84-ERA-9 through 84-ERA-12, Final Order Approving Settlement and Dismissing Complaints, Feb. 22, 1994, slip op. at 4 and cases there cited. In accord with earlier decisions, I decline to place the Agreement under seal. See, e.g., *Porter v. Brown & Root, Inc.*, Case No. 91-ERA-4, Sec. Final Ord. Disapproving Settlement and Remanding Case, Feb. 24, 1994, slip op. at 9-10; *Corder v. Bechtel Energy Corp.*, Case No. 88-ERA-9, Sec. Ord., Feb. 9, 1994, slip op. at 2-5; *Debose v. Carolina Power & Light Co.*, Case No. 92-ERA-14, Sec. Ord. Disapproving Settlement and Remanding Case, Feb. 7, 1994, slip op. at 2-4.

No one has requested a copy of the Agreement pursuant to the FOIA, and therefore it would be premature for me to determine if it contains commercial or financial information that comes within the "trade secrets" exemption to the FOIA, 5 U.S.C. § 552(b)(4), or any other exemption. See, *Corder*, slip op. at 5.

As the ALJ noted, the Respondent has requested predisclosure notification pursuant to 29 C.F.R. § 70.26 should anyone file a FOIA request that encompasses the Agreement. [1] As custodian of the documents, the Office of Administrative Law Judges is directed to place a notice prominently displayed in the record of this case referring to Respondent's request and directing that the procedures in 29 C.F.R. § 70.26 be followed if an FOIA request is received that encompasses the settlement agreement.

Paragraph 7 of the Agreement appears to prohibit the parties from voluntarily discussing the facts surrounding the complaint with government agencies. It provides in relevant part:

Except to carry out the specific covenants of this Agreement or unless specifically required by court order or government agency order, *none of the parties shall* directly or indirectly, or by any means or manner whatsoever *disclose, urge, encourage, cooperate in, cause or permit the disclosure of dissemination to any person or entity the contents or substances of this Agreement*, any consideration given or received hereto, the claims or demands released herein, *and all matters arising therefrom or relating thereto.* \*

\* \* PROVIDED further that H&N,

Inc. may discuss the terms of the settlement  
with the United States Department of Energy.

---

[PAGE 3]  
(Emphasis added.)

In *Wampler v. Pullman-Higgins Co.*, Case No. 84-ERA-13, Fin. Ord. Disapproving Settlement and Remanding Case, Feb. 14, 1994, slip op. at 4, a provision in the settlement agreement stated that "[n]either party will discuss or disclose the facts of this case except if ordered to do so by [a] court, tribunal or agency of competent jurisdiction." The Secretary found that "[t]o the extent that this provision could be construed as restricting Complainant from voluntarily communicating and providing information to any federal or state government agencies, it is void as contrary to public policy and unenforceable." *Id.*

Likewise, the provisions of Paragraph 7 of this Agreement are void as contrary to public policy and unenforceable to the extent that they could be construed as restricting Complainant from communicating voluntarily with, and providing information to, any Federal or state government agencies.

In Paragraph 12, the parties agreed to sever any part of the Agreement "held, determined or adjudicated to be invalid, unenforceable or void for any reason whatsoever" and that severance shall not affect the validity or enforceability of the remaining portions. The severance provision permits me to approve the remainder of the Agreement without the offending language prohibiting the parties from discussing the facts surrounding the complaint with government agencies. Compare *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1155-1156 (5th Cir. 1991) ("Severing paragraph 3 eliminated a material term of the agreement. This the Secretary cannot do *without the consent of the other two parties.*" (emphasis added)).

The Agreement provides that it shall be construed and interpreted in accordance with the laws of the State of Nevada. See Par. 11. I interpret this statement as not limiting the authority of the Secretary of Labor or a Federal court under the ERA and implementing regulations. See *Phillips v. Citizens Ass'n for Sound Energy*, Case No. 91-ERA-25, Final Order of Dismissal, Nov. 4, 1991, slip op. at 2.

I find that the Agreement, as construed in this decision, is a fair, adequate and reasonable settlement. Accordingly, the Agreement is approved as here construed and the complaint is DISMISSED with prejudice.

SO ORDERED.

ROBERT B. REICH  
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Under the Department's regulation implementing the FOIA,

submitters of information may designate specific information as confidential commercial information, 29 C.F.R. § 70.26(b) (1993), as Respondent has done here. When an FOIA request for such information is received, the Department of Labor will notify the submitter promptly, 29 C.F.R. § 70.26(c), the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. § 70.26(e), and the submitter will be notified if a decision is made to disclose the information. 29 C.F.R. § 70.26(f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified. 29 C.F.R. § 70.26(h).